

reports provided by the D Block licensee, and exercising its other responsibilities enumerated above and in the *Second Report and Order*. The Public Safety Broadband Licensee will also have the authority to act on information provided in the D Block licensee's reports, if necessary, by bringing a complaint or petition for declaratory ruling to the Commission.⁴³⁸ This authority will enable the Public Safety Broadband Licensee to carry out its core responsibility to ensure compliance with Commission rules and policies by users of the public safety broadband spectrum.

202. Accordingly, we tentatively conclude that we should clarify the Public Safety Broadband Licensee's responsibilities with respect to "general administrator of access," as well as the requirement (codified in existing rule sections 27.1305(h) and 90.1405(h)) that the network incorporate "operational control" as follows. We propose that the D Block licensee(s) build into the shared broadband network infrastructure a capability to provide monthly usage reports covering network capacity and priority access so that the Public Safety Broadband Licensee can monitor usage and provide appropriate feedback to the D Block licensee(s) on operational elements of the network. We further propose that the Public Safety Broadband Licensee utilize these reports to carry out its role in administering access to the shared broadband network in consultation with local, regional and state public safety agencies. The Public Safety Broadband Licensee also may administer access in terms of establishing access priorities and service levels, authenticating and authorizing public safety users, approving equipment and applications for public safety end users of the network, and interacting with the public safety community to facilitate an understanding of the opportunities made possible by subscribing to the interoperable shared broadband network and the procedures for doing so.

6. Post-Auction Process for Establishing a Network Sharing Agreement

203. Background. In the *Second Further Notice*, the Commission sought comment on whether and how to modify the post-auction process, including provisions governing negotiations between a winning D Block bidder and the Public Safety Broadband Licensee for a Network Sharing Agreement. The Commission sought comment on whether modifications to the process would create greater incentives for the D Block winner and the PSBL to negotiate the terms of the NSA in good faith, while reasonably protecting their respective interests. In particular, comment was sought regarding what consequences following failure to negotiate an NSA would provide the best set of incentives for effective negotiation. For example, such consequences could include offering a D Block license to the next highest bidder, as well as possibly requiring the initial D Block winner to cover the PSBL's costs associated with the unsuccessful negotiations; or conducting a new auction, with or without the winner of the initial auction; or conducting a new auction with licenses no longer subject to the Public Private Partnership, with or without the winner of the initial auction and/or with parties previously excluded from the initial auction; and/or subjecting the D Block winning bidder to default payments, either dependent on or irrespective of its good faith in conducting the negotiations.

204. Discussion. In this section, we tentatively conclude that the public interest in achieving a nationwide interoperable public safety broadband network following bidding for alternative D Block licenses will be served best by making no provision at this time for lifting the Public Private Partnership conditions following such bidding. We further tentatively conclude that we should adopt a rule providing that if a winning bidder should for any reason not be assigned a license following an auction of D Block licenses subject to the Public Private Partnership Conditions, including due to a failure to negotiate an NSA, the Commission shall offer to the other bidder(s) with the next highest bid(s) on the license(s) any license that was not assigned. We direct the Wireless Telecommunications Bureau to specify the circumstances in which the Commission may make such an offer in the context of the final procedures adopted for any auction of D Block licenses.

205. Our separate tentative conclusion to offer multiple regional licenses for the D Block, in

⁴³⁸ See *Second Report and Order*, 22 FCC Rcd at 15470 ¶ 528.

addition to a nationwide license, presents the possibility that separate NSAs may apply to separate licenses. We tentatively conclude that the Commission should review and, if in the public interest, may accept NSAs for some licenses, even if acceptable NSAs are not submitted with respect to all licenses.

206. We tentatively conclude that we should continue to provide for Commission resolution of any impasse between the parties negotiating any NSA. We further tentatively conclude that a winning D Block bidder shall not be subject to a default payment in the event there ultimately is no agreement on the terms of the NSA, provided that it accepts any Commission resolution of an impasse in the process of negotiating the NSA.

207. The unique requirement for the D Block that winning bidders to negotiate the terms of an NSA with the PSBL following bidding for the licenses but before being granted the license may produce circumstances not contemplated by the Commission's current rules for processing a winning bidder's license application. For example, the Commission's current rules do not contemplate denial of a winning bidder's application without finding the applicant is either disqualified or in default or both.⁴³⁹ As discussed herein, however, there may be circumstances in which the Commission will not assign the license even though the winning D Block bidder has not defaulted and, but for the absence of an acceptable NSA, might otherwise be qualified to be licensed. Accordingly, we propose a rule specific to the D Block setting forth post-auction application procedures consistent with the tentative conclusions reached in this *700 MHz Third Further Notice of Proposed Rulemaking*.

208. We tentatively conclude that the current record does not demonstrate that any other alternatives for determining the terms of the NSA, either through processes modeled on a Request for Proposal mechanism or other proposals to finalize the NSA prior to an auction, will better serve the public interest than the Commission's initial proposal that the winning bidder(s) in an auction to license the D Block should negotiate the terms of the NSA with the PSBL. We seek comment on all the tentative conclusions with respect to the process for negotiating the NSA.

209. Finally, given the proposal to offer the D Block on a regional basis, and the other significant changes proposed herein, we seek comment on whether we should adopt further changes to the process for establishing the NSA.⁴⁴⁰ For example, we seek comment on whether we should reduce or modify the current negotiation reporting requirements, which obligate the Public Safety Broadband Licensee and the D Block winning bidder to jointly provide detailed reports on a monthly basis on the progress of the negotiations.

a. Action if All or Some D Block Winning Bidders Are Not Assigned Licenses

210. Comments. Several parties, predominantly public safety entities, contend that any Commission commitment to license D Block without the Public Private Partnership under any subsequent circumstances might undermine the chances for a successful Public Private Partnership. Specifically, APCO notes that providing for subsequent action on the D Block in the event there is no winning bidder after an auction subject to the Public Private Partnership may create incentives for parties that prefer those other alternatives in order to prevent licensing pursuant to the Public Private Partnership.⁴⁴¹ NATOA *et al.* concurs, as does PSST.⁴⁴² TeleCommUnity asserts that any such provision "may guarantee a failed second auction" to license the D Block pursuant to the Public Private Partnership.⁴⁴³ Equipment

⁴³⁹ Cf. 47 C.F.R. § 1.2109(c).

⁴⁴⁰ 47 C.F.R. § 27.1315.

⁴⁴¹ APCO Comments at 40.

⁴⁴² NATOA *et al.* Comments at 23, PSST Comments at 43.

⁴⁴³ TeleCommUnity Comments at 15.

manufacturer Ericsson echoes these public safety commenters.⁴⁴⁴

211. With respect to the particular scenario in which a winning bidder is unable to negotiate a Network Sharing Agreement, PSST supports offering the license to a next highest bidder.⁴⁴⁵ Ericsson also advocates this approach, as the most direct way to achieve the benefits of the Public Private Partnership, despite the initial winner's failure to negotiate an NSA.⁴⁴⁶

212. In opposition, commercial provider MetroPCS, which advocates abandoning the Public Private Partnership model outright, insists that at a minimum the Commission should provide for an immediate subsequent auction to license the D Block without the Public Private Partnership in the event an auction subject to the Public Private Partnership does not succeed.⁴⁴⁷ MetroPCS advocates that the Commission license the D Block without the Public Private Partnership by assigning licenses by CMA and without accepting package, or combinatorial, bids.⁴⁴⁸

213. Discussion. We tentatively conclude that the public interest in achieving a nationwide interoperable public safety broadband network following the next auction of D Block licenses will be served best by making no provision for lifting the Public Private Partnership conditions at this time. Experience gained from an attempt to establish a successful Public Private Partnership following the next auction may help chart the future course of the D Block spectrum. Moreover, achieving a successful nationwide interoperable public safety broadband network is more important than accelerating the licensing of the D Block.

214. A number of commenters support offering the D Block license to the next highest bidder following any failure to negotiate an NSA. These comments focus on providing a winning D Block bidder with the best incentives to negotiate an NSA. However, the public interest in achieving a nationwide interoperable public safety broadband network as soon as possible also will be furthered if, in the event the Commission determines it will not assign a license or license(s) to a winning bidder for any reason, such as the winning bidder's default for failure to make post-auction payments or disqualification due to failure to meet the Commission's requirements of a D Block licensee, the Commission offers the relevant license(s) to the other bidder(s) that placed the next highest bid on the same license(s). Consequently, we consider more generally under what circumstances, if any, the Commission may offer a license to another bidder without conducting a second auction.

215. Pursuant to its current rules, the Commission has authority to offer licenses to bidders with the next highest bids without re-opening bidding but only in auctions in which a disqualified winning bidder's bid could not have helped determine the winning bids on other licenses. The Commission's rules currently provide discretion to make such an offer in Commission auctions without package bidding, while precluding it from doing so in auctions with package bidding.⁴⁴⁹ The

⁴⁴⁴ Ericsson Comments at 32.

⁴⁴⁵ PSST Comments at 42.

⁴⁴⁶ Ericsson Comments at 32.

⁴⁴⁷ MetroPCS Comments at 7.

⁴⁴⁸ MetroPCS Comments at 20-23.

⁴⁴⁹ See 47 C.F.R. § 1.2109(c) (in the event a winning bidder "is found unqualified to be a licensee . . . the Commission may . . . offer [the license] to the other highest bidders (in descending order) at their final bids.") We clarify here that the imposition of liability for a default payment, referenced in the first sentence of Section 1.2109(c), is not a precondition to the Commission offering the license to the next highest bidder. Rather, once a winning bidder is found "unqualified," which in the context of the D Block would include a finding that the winning bidder has been unable to negotiate a Network Sharing Agreement with the PSBL that the Commission will accept, (continued....)

Commission's rules make this distinction because in an auction with package bidding, absent the disqualified bid(s) the next highest bid(s) of other bidder(s) for the same license(s) or package may not have become a winning bid and a group of other bids for different packages of licenses might have become the winning bids. In that case, the disqualified bidder's bid helped determine not only the winner of the licenses subject to the disqualified bid but also the winner of other licenses.

216. Given the public interest at stake in the D Block being used to deploy rapidly a nationwide interoperable broadband network for public safety use, we tentatively conclude that the Commission should have authority to offer a license to the next highest bidder if a winning bidder in an auction of alternative D Block licenses subsequently defaults or is disqualified. The offer will be for the same license won by the initial winning bidder, so that any offer for a PSR license will be made to the next highest bidder for a license using the same technology platform, even if higher bids were placed on a license for the same PSR using a different technology platform or a set of bids for alternative licenses would have won absent the subsequently defaulted or disqualified bid. Moreover, we tentatively conclude that the Commission should be able make such an offer whether bidding on alternative licenses was conducted with or without package bidding. We will adopt a rule specifically for the D Block incorporating these provisions.

217. We reach this tentative conclusion while recognizing that simultaneously offering alternative licenses for the D Block has similarities to a package bidding auction, even absent package bidding as defined in the Commission's rules.⁴⁵⁰ For example, if bidders on regional licenses collectively outbid a bidder for the alternative nationwide license, it is possible that the bid on one of those regional licenses affected the outcome for all the other regions by making the aggregate bid for the regional licenses greater than the bid for the nationwide license.⁴⁵¹ However, given the importance of rapidly licensing the D Block, we tentatively conclude that, following the simultaneous offer of alternative D Block licenses, whether or not package bidding is available, if the Commission determines that it will not assign any license(s) to an initial winning bidder, the Commission may offer the same license(s) to the next highest bidder, even if a different set of licenses covering the same population would have had a higher aggregate bid in the absence of the initial winning bid. We seek comment on our tentative conclusion and whether any alternative would better serve the purposes for making such offers.

218. We tentatively conclude that it would not be appropriate to either require the Commission to offer the license to the next highest bidder or to require the next highest bidder to accept the license. The Commission should retain flexibility to utilize any information obtained from the efforts of an initial D Block winning bidder and the PSBL to negotiate an NSA, which might suggest a superior course to simply offering the license to the next highest bidder. Similarly, not requiring the next highest bidder to accept the license provides that party with the flexibility to consider information developed during the initial negotiations, which may avoid further unsuccessful negotiations for the NSA. We seek comment on these tentative conclusions.

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the Commission then "may . . . offer [the license] to the other highest bidders," regardless of whether the winning bidder is liable for a default payment.

⁴⁵⁰ See 47 C.F.R. §1.2103(b).

⁴⁵¹ This will not always be the case. A post-auction disqualification of one winning bidder in an auction of alternative licenses or a package bidding auction may not affect other winning bidders for other licenses. For example, bidders for a group of single licenses might have prevailed against a bid on an alternative nationwide license – or package of single licenses – even if one of the original winning bids is replaced by a second highest bid on a single license. The Commission's standard package bidding rule applies a bright line for all package bidding auctions, regardless of the particular bids in the auction.

b. Separate NSAs for Different Licenses

219. Given our tentative conclusion to offer regional licenses for the D Block, we also must consider whether all the winning bidders for D Block licenses must successfully negotiate NSAs, either jointly or individually, in order for any of them to be licensed, or whether the Commission may license a subset of winning bidders based on their success in negotiating NSAs notwithstanding the inability of other winning bidders to do so. We tentatively conclude that the Commission may accept NSAs that are negotiated between the PSBL and a subset of winning bidders. When negotiating NSAs with winning bidders in a subset of areas to be licensed, the PSBL should take into account the flexibility needed in the future to meet the needs of other unlicensed areas. This should prevent unnecessary limitations being imposed on future NSAs for unlicensed areas as a result of NSAs for areas licensed first. We further note that the Commission may take such concerns into account in determining whether to accept NSAs in areas where the winning bidder and the PSBL are able to come to agreement.

c. Liabilities of D Block Winning Bidders That Fail to Negotiate an NSA

220. Almost all commenters addressing whether to assess a default payment on a D Block winner that fails to negotiate an NSA would, at least in some circumstances, eliminate the default payment in the event a winning bidder is unable to negotiate an NSA. PSST believes that replacing the default payment with an automatic offer to the second highest bidder will serve the purposes underlying the Commission's default payment rule.⁴⁵² APCO contends that "[a]bsent bad faith, the D Block auction winner should not pay a substantial financial penalty if NSA negotiations fail (though some cost should be imposed to encourage serious good faith negotiations)."⁴⁵³ While NPSTC believes that the default payment rule, like a reserve price, can serve to help ensure that D Block participants possess the financial, technical and managerial resources to perform responsibly, NPTSC believes that the Commission should provide sufficient assurance through other means, in which case the default payment can be reduced or removed.⁴⁵⁴ NATOA *et al.* acknowledge the difficulty that large default payments may create for potential D Block applicants but stress the importance that any winning D Block bidder that does not negotiate in good faith should face "significant" penalty or forfeiture.⁴⁵⁵

221. AT&T proposes that a winning bidder should only be subjected to default payments if it acted in bad faith and that it should enjoy a presumption of good faith.⁴⁵⁶ In addition, AT&T suggests that the Commission stipulate that any proposal satisfying minimum requirements delineated by the Commission would be deemed per se to be in good faith.⁴⁵⁷ Council Tree Communications agrees that absent bad faith, no default payment should be required.⁴⁵⁸ Northrop Grumman asserts that the Commission should relieve any winning bidder that negotiates the NSA in good faith from any default liability in the event no agreement can be reached, but does not discuss the standard for determining

⁴⁵² PSST Comments at 42.

⁴⁵³ APCO Comments at 38.

⁴⁵⁴ NPSTC Comments at 10.

⁴⁵⁵ NATOA *et al.* Comments at 22.

⁴⁵⁶ AT&T Comments at 23.

⁴⁵⁷ AT&T Comments at 23.

⁴⁵⁸ Council Tree Comments at 17. It asserts that if, however, the Commission retains the default payment in all circumstances, then only AT&T, Sprint Nextel, T-Mobile, and Verizon Wireless should be subject to its provisions. Council Tree Comments at 20.

“good faith.”⁴⁵⁹

222. MetroPCS, however, would retain the default payment for a winning D Block bidder that fails to negotiate an NSA, apparently regardless of the bidder’s good faith.⁴⁶⁰

223. Discussion. We tentatively conclude that if the Commission dismisses a winning bidder’s long-form application solely for the lack of a Commission-approved NSA, a winning D Block bidder should only be subject to a default payment if it chooses not to accept the Commission’s resolutions to any and all impasses in the process of negotiating an NSA.⁴⁶¹ Accordingly, if the Commission does not mandate a resolution to an impasse for any reason, or the PSBL refuses to accept a Commission resolution after the D Block bidder does so, the winning D Block bidder will not be subject to a default payment. Given the importance of developing a nationwide interoperable broadband network usable for public safety, the Commission will attempt to resolve any disputes between a winning D Block bidder and the PSBL with respect to the terms of the NSA. The Commission will use its discretion to determine how best to take into account the winning D Block bidder’s business plan, as well as the requirements of public safety users, when mandating a resolution. The winning D Block bidder will be subject to a default payment if it refuses to accept any resolution mandated by the Commission. In the event that the Commission does not mandate a resolution, or if the D Block winner accepts the Commission’s resolution but the PSBL declines to do so, the D Block winning bidder will not be subject to a default payment. Thus, a D Block winning bidder only will be exposed to default payment liability from a negotiation failure if the Commission mandates a resolution that the D Block winner chooses not to accept. The D Block winner’s subjective “good faith” or “bad faith” will not play a role in determining default payment liability. We tentatively conclude that this standard should sufficiently protect D Block bidders against any risk that the PSBL has requirements for the NSA that cannot be reasonably accommodated as part of the D Block winner’s business plan. Employing a sweeping “good faith” exception to the application of our default rule as advocated by some commenters would place the Commission in the untenable position of having to evaluate the D block winning bidder’s motives and business judgments, which could significantly delay the NSA resolution process. Instead, by placing the ultimate decision of acceptance of the negotiated NSA or default in the hands of the D Block winning bidder, it will have the ability to weigh its choices and reach a determination of commercial viability.

224. Although we tentatively conclude that we should not use a “good faith” standard in connection with imposing liability on D Block winning bidders based solely on a failure to negotiate an NSA, we ask commenters whether there is another reasonable alternative to our proposal to impose liability based on whether a D Block winning bidder chooses to accept the Commission’s resolution of any negotiation disputes. Further, we seek comment on any solutions to the difficulties of applying a “good faith” standard. We also sought comment on whether any winning bidder unable to negotiate an NSA with the PSBL that was acceptable to the Commission should be required to pay the PSBL’s costs arising from the unsuccessful negotiations. We tentatively conclude that we should not impose such a requirement. While it might immunize the PSBL against otherwise unnecessary expense, the overall impact on the D Block winning bidders’ incentives to negotiate would be minimal. Finally, the administrative process of accounting for expenses directly related to the negotiation might needlessly complicate the negotiation process.

⁴⁵⁹ Northrop Grumman Comments at 9.

⁴⁶⁰ MetroPCS Comments at 34.

⁴⁶¹ The Commission’s competitive bidding rules and precedents governing post-auction defaults would apply to bidders for D Block licenses in other contexts, e.g., failure to make post-auction payments, failure to file an acceptable long-form application, etc.

d. NSA Negotiation Process

225. The few comments directly addressing the negotiating process within the context of the Commission's proposal for negotiation of an NSA between the D Block winning bidder and the PSBL are divided on the Commission's role. According to APCO, "it is important that the FCC continue to be the final arbiter of disputes."⁴⁶² Northrop Grumman, in contrast, argues that the Commission should assure a winning D Block bidder a "way out" by eliminating any binding arbitration of disputes with the PSBL when negotiating the NSA.⁴⁶³

226. The City of Philadelphia contends that "the Commission should require the PSBL to establish and delegate authority to regional entities comprised of public safety agencies to negotiate terms of the NSA that affect their operations, including commercial use of public safety spectrum, priority access for public safety communications, and preemption in cases of local or regional emergency."⁴⁶⁴

227. Discussion. We tentatively conclude that we should continue to provide for final Commission resolution of any impasse between the parties negotiating the NSA. While we concur with the view that winning D Block bidder(s) should have a "way out" without the imposition of liability in the event that it proves impossible to negotiate an acceptable NSA, the appropriate "way out" is to provide for Commission to determine the final resolution of any dispute in connection with the negotiation of the NSA, including, should the Commission find it in the public interest, requiring the parties to accept specified terms resolving the dispute. The Commission's resolution will be final. We note that should the Commission conclude that it is unable to arrive at a resolution that the Commission believes is reasonable to require the parties to adopt, our tentative conclusion is that we will not impose default payment obligations on the winning D Block bidder. In short, a winning D Block bidder unable to reach agreement with the PSBL need only prove its case to the Commission in order to be relieved of any liability for failure to negotiate the NSA. We think this "way out" provides the best balance of incentives to negotiate the NSA in good faith, rather than leaving the parties free to reject attempts at resolving any disputes.

228. With respect to the issue of involving local entities in the negotiation of the NSA, we disagree with Philadelphia's proposal that the PSBL should delegate authority to regional or local authorities to negotiate terms with the D Block licensee. One of the primary roles of the PSBL is to serve as the single public safety representative for purposes of negotiating the NSA. Permitting multiple public safety parties to conduct simultaneous NSA negotiations with the D Block licensee would be inefficient and unwieldy, and would detract from the ultimate goal of achieving a nationwide interoperable broadband network for the entire public safety community. At the same time, the PSBL must carry out its responsibility to negotiate the NSA in a manner that is broadly representative of the public safety community. Accordingly, we tentatively conclude that, while it would be contrary to the PSBL's primary NSA negotiation responsibility to allow individual public safety entities to negotiate directly with the D Block auction winner(s), the PSBL must reasonably afford and accommodate local public safety input into its deliberations, and in doing so, balance local needs with the rules and policies ultimately adopted in this proceeding. Moreover, the limitation on negotiation by local agencies does not preclude them from contributing to the construction of the network with financial or other resources where they are able to do so. Thus, we tentatively conclude that local public safety agencies, the PSBL, and the winning bidder, where they are able to agree to particular terms for local contribution to the network that expand upon a baseline agreement, will be free to do so and incorporate those terms within the larger NSA.

⁴⁶² APCO Comments at 38.

⁴⁶³ Northrop Grumman Comments at 9.

⁴⁶⁴ Philadelphia Comments at 3-4.

e. **RFPs and other alternatives for determining NSA terms**

229. Background. In the 700 MHz *Second Further Notice*, the Commission sought comment on whether a request for proposal (RFP) approach in conjunction with an auction might serve to establish the terms of the Network Sharing Agreement. More specifically, the Commission sought comment on whether to conduct an auction and then have a number of high bidders submit proposals in response to an RFP outlining the needs of the PSBL or, alternatively, whether to issue an RFP outlining public safety needs, then use one of the proposals submitted in response to establish rules on the terms of an NSA, and finally conduct an auction open to all parties interested in complying with those terms.

(i) **RFP Approaches**

230. Comments. Teleate proposes an approach along the lines of the Commission's first RFP-related suggestion. More specifically, Teleate proposes that the Commission accept proposals to satisfy public safety needs from all bidders willing to meet a minimum bid of \$150 million and then score the proposals based on the weight given to various proposal features, including the bid amount.⁴⁶⁵ The applicant with the highest score would then negotiate the final NSA details with the PSBL.⁴⁶⁶ As part of its proposal for licensing the D Block, Teleate proposes that bidders unable to negotiate an NSA would not be subject to a penalty.⁴⁶⁷

231. NTCH, a PCS provider and tower development company, proposes an RFP-related approach roughly along the lines of the Commission's second suggestion. NTCH suggests that would-be "network managers" negotiate alternative NSAs with the PSBL and subsequently applicants for licenses would place bids on licenses, specifying with which of the potential NSAs the bidder will comply.⁴⁶⁸ High bids for licenses complying with the same NSA would be aggregated and compared with aggregated high bids for licenses complying with the terms of other NSAs. The NSA receiving the highest aggregate amount of license bids would win. The network manager for that NSA would undertake to build out any licenses not assigned to other parties based on the bidding.⁴⁶⁹

232. Leap proposes that the Commission use a contracting process between public safety users and the D Block licensee to determine what network requirements the D Block licensee will satisfy beyond those required by the Commission's commercial rules. Leap appears to advocate that the Commission modify its standard 700 MHz rules by imposing a requirement that the D Block licensee make its network available to public safety, via the PSBL, and negotiate in good faith with public safety users, via the PSBL, regarding any network improvements that the public safety users may require, with the cost of such improvements to be financed by the public safety users.⁴⁷⁰

233. AT&T, Verizon Wireless, and others promote a non-auction RFP approach to achieving the goal of an interoperable nationwide network.⁴⁷¹

234. Discussion. As discussed elsewhere in this Third Further Notice, we tentatively conclude that the detailed Public/Private Partnership proposal set out in this Third Further Notice remains the best option to achieve nationwide build-out of an interoperable broadband network for public safety entities,

⁴⁶⁵ Teleate Comments at 5.

⁴⁶⁶ Teleate Comments at 5.

⁴⁶⁷ Teleate Comments at 6.

⁴⁶⁸ NTCH Comments at 5.

⁴⁶⁹ NTCH Comments at 5.

⁴⁷⁰ Leap Comments at 12-13.

⁴⁷¹ See, generally, AT&T Comments; Verizon Wireless Comments.

given the current absence of legislative appropriations for this purpose and the limited funding available to the public safety sector.⁴⁷² We find that the RFP proposals submitted by parties in the record are not as likely to sustain the Commission's commitment to achieving a nationwide interoperable broadband network that meets public safety needs.

235. For instance, we tentatively conclude that Televate and NTCH have not demonstrated that their proposals are workable in their current form. For example, Televate's proposal, while generally describing the relative percentage weight to be applied to different portions of bidder proposals, does not provide any guidance on the difficult question of how to actually score each proposal. With respect to NTCH's proposals, we are not persuaded that the Public Safety Broadband Licensee will be able to negotiate final terms of multiple NSAs with various network operators in the absence of the actual licensees who are to build and construct the ultimate network. Accordingly, any advantages these proposals might have are hypothetical and insufficient for us to adopt them in place of the existing structure of licensing the D Block and having the NSA determined by negotiation between winning bidder(s) and the Public Safety Broadband Licensee.

236. Finally, we tentatively conclude that Leap's proposal offers insufficient assurance that the D Block licensee will in fact negotiate terms that will result in an interoperable broadband network that meets the needs of public safety on a nationwide basis. The most likely outcome of adopting Leap's proposal seems to be a nationwide interoperable commercial network supplemented by a patchwork of regional arrangements meeting the needs of public safety to the extent that local or regional public safety users are able to finance network modifications required to meet their needs. Given that the entire premise of the Public Private Partnership is that public safety users lack sufficient financing to meet their needs, we tentatively conclude that Leap's proposal will not serve the public interest.

(ii) Alternative Commenter Proposals

237. Comments. In addition to RFP approaches, several commenters propose alternative approaches to establishing an NSA that diverge from the Commission's initial proposal that a winning D Block bidder and the PSBL negotiate an NSA after an auction to license the D Block. The Mercatus Center at George Mason University proposes that the NSA be negotiated prior to auctioning the license, "through a negotiated rulemaking," with the Commission establishing a "negotiation committee composed of the current members of the PSBL and the representatives from potential bidders in the auction."⁴⁷³

238. United States Cellular argues that the PSBL, in conjunction with the public safety service providers, should establish the NSA prior to auction, subject to amendments thereafter.⁴⁷⁴ In this context, with the NSA established pre-auction, United States Cellular favors subjecting any D Block winner that does not execute an NSA to the Commission default payment rules.⁴⁷⁵

239. Discussion. We tentatively conclude that the public interest in achieving a nationwide interoperable broadband network would be best served by accepting bids for D Block licenses prior to negotiating the terms of the NSA. We therefore decline to adopt these alternative proposals for

⁴⁷² We note that AT&T and Verizon Wireless state that their proposals conflict with our prior determination in the *Second Report and Order* that Section 337 of the Communications Act requires that we license spectrum allocated for commercial purposes in the upper 700 MHz band (which includes the D Block) by competitive bidding, and that AT&T asserts that Congress would be willing to revise the statute to permit an alternative approach. See AT&T Comments at 7; see also Verizon Wireless Reply Comments at 2.

⁴⁷³ Mercatus Comments at 3.

⁴⁷⁴ US Cellular Comments at ii-iii.

⁴⁷⁵ US Cellular Comments at 21.

determining the terms of the NSA prior to auction. As reflected in the Draft Network Sharing Agreement accompanying this *Third Further Notice of Proposed Rulemaking*, with the revised rules proposed herein, we provide considerable additional certainty as to the "baseline" terms of the NSA, rendering full negotiation of the NSA in advance of auction unnecessary. Thus, all key baseline requirements to be covered by the NSA have been either defined or identified prior to auction, thereby providing a level of certainty to prospective bidders and ensuring uniformity and consistency among regional networks in the event regional licenses ultimately are implemented. While any given bidder for a D Block license would prefer to have all the terms of the NSA known prior to making its bid, we have tentatively concluded that, with respect to additional matters to be covered by the NSA, negotiation between a winning bidder and the PSBL will be the most effective means to achieving the best result. Terms that are not essential to the successful operation of an NSA may nevertheless be important to the viability of one bidder's business plan—while irrelevant to another. Predetermining such NSA terms prior to conducting an auction risks precluding many potential applicants, as well as denying the winning bidder flexibility that may be essential to achieving a nationwide interoperable broadband network that meets the needs of public safety. We seek comment on our tentative conclusions.

7. Auction Issues

240. Background. In the *700 MHz Second Further Notice*, the Commission sought comment on four specific issues related to how to conduct an auction to license the D Block subject to the Public Private Partnership. In particular, the Commission requested that commenters address (1) whether to restrict eligibility of entities to participate in the D Block auction based on their access to other 700 MHz spectrum; (2) how to determine any reserve price in such an auction; (3) whether to adopt an exception to the impermissible material relationship rule for determination of designated entity eligibility; and (4) whether we should modify the auction default payment rules. In addition, the Commission solicited comment on whether there were any other changes that should be made to the standard competitive bidding rules with respect to an auction to license the D Block.

241. Summary. In this section, we reach several tentative conclusions with respect to issues related to the next auction to license the D Block. We have tentatively concluded in this *Third Further Notice of Proposed Rulemaking* that licenses subject to three alternative provisions regarding the technology platform with which the license(s) can be used should be offered. The three alternatives are as follows: a nationwide license with which the winning bidder may use a technology platform of its choice and two types of regional licenses, one in which the licenses are to be used with LTE technology and a second in which the licenses are to be used with WiMAX technology. We tentatively conclude that the Commission will determine which of these alternative licenses to assign based on the results of an auction in which all of the licenses are offered simultaneously.

242. Furthermore, we tentatively conclude, in light of our primary goal of facilitating the development of a *nationwide* interoperable shared broadband network for the public-private partnership, that it is in the public interest to award licenses to the highest bidder(s) for the license(s) in the technology platform alternative for which license(s) receiving bids cover the greatest aggregate population, provided that at least half of the nation's population is covered. If the provisionally winning bids do not cover at least half of the nation's population, the auction will be cancelled and no D Block licenses will be awarded based on the results of the auction. Thus, the high bid on the nationwide, technology platform alternative would be the provisionally winning bid over any aggregate bid(s) covering less population in the two sets of regional licenses until there are bids on all regions in at least one of the alternatives. In addition, if there are high bids for license(s) in more than one of the alternatives covering equal population, subject to the minimum coverage requirement, licenses will be awarded to high bidder(s) for license(s) in the technology platform alternative that receives the highest aggregate gross bid(s). Finally, to promote competition during the bidding for licenses covering as much population as possible, we tentatively conclude that we should direct the Wireless Telecommunications Bureau to establish auction procedures that will encourage bidding on licenses covering as much population as possible. For instance, with that goal in mind, we intend that provision be made to reduce minimum opening bids on

unsold regional licenses during bidding. In addition, in furtherance of our goal of achieving the widest possible population coverage, we tentatively conclude that package bidding on the sets of regional licenses would be in the public interest and that we should direct the Wireless Telecommunications Bureau to establish procedures for package bidding for this purpose.

243. In addition, the tentative conclusions we reach on issues raised in the *700 MHz Second Further Notice of Proposed Rulemaking* all reflect our determination that the public interest in achieving a nationwide interoperable broadband network that meets the needs of public safety can best be promoted by auction provisions that will increase the likelihood of active participation in an auction and competition for the licenses. Accordingly, we tentatively conclude that we should not adopt any restriction on the eligibility to bid for D Block licenses by any entity otherwise eligible to be a D Block licensee based on its spectrum holdings, whether in the 700 MHz band or any other band. We also tentatively conclude that we should direct the Wireless Telecommunications Bureau to not adopt a reserve price greater than any minimum opening bid or bids. We further tentatively conclude that we should codify the substance of the previously granted waiver of the impermissible material relationship rule with respect to designated entity eligibility in connection with the D Block. As discussed in connection with the process for establishing the NSA, we tentatively have concluded the only change needed with respect to our default payment rules for purposes of the D Block is a modification that limits application of the default payment rule to specific circumstances following the failure to negotiate an NSA with the PSBL that is acceptable to the Commission. Finally, for a variety of reasons, we tentatively conclude that we should not make any of the additional changes to our competitive bidding rules proposed by commenters. We seek comment on all these tentative conclusions.

a. Determining Geographic Area and Platform Technology Through Auction

244. We tentatively conclude that rather than require that applicants offer service nationwide or that winners of regional licenses must use a predetermined technology platform, it is in the public interest to offer simultaneously at auction alternative licenses, specifically a single national license for use with a technology platform of the licensee's choice and regional licenses for use with one of two specific technology platforms. Under this proposal, D Block license(s) would be awarded to the highest bidder(s) for license(s) in the technology platform alternative (i.e., either the nationwide license or one of the sets of regional licenses) for which there are high bid(s) on license(s) covering the greatest aggregate population, subject to conditions of grant, including long-form license application processing. In the event that there is a tie in the greatest aggregate population covered by licenses with high bids in more than one of the alternatives,⁴⁷⁶ we would award license(s) to the high bidders for license(s) in the alternative that receives the highest aggregate gross bid(s). Furthermore, we tentatively conclude that the Wireless Telecommunications Bureau should establish, as part of its pre-auction process, specific procedures to implement such an auction, including provisions for reducing minimum opening bids on regional licenses, that will promote bidding on licenses covering as much population as possible, and specific procedures to make available package bidding for groups of regional licenses using the same technology platforms.

245. By offering alternative licenses at auction simultaneously, the Commission can use the auction results to determine which license(s) will facilitate coverage of the maximum population by the nationwide interoperable shared broadband network for the public-private partnership. Specifically, the

⁴⁷⁶ For purposes of determining the extent of population covered by licenses with high bids, the Commission would treat the license for the Gulf of Mexico PSR as having population. Thus, a bid on the nationwide license would cover a greater aggregate population than bids on a set of regional licenses that covered all PSRs other than the Gulf of Mexico PSR. Similarly, bids on one set of regional licenses that include a bid on the Gulf of Mexico PSR license will cover a greater aggregate population than bids on the second set of regional licenses covering the same population but without a bid on the Gulf of Mexico PSR license.

Commission proposes to offer simultaneously licenses with three alternative conditions regarding the technology platform that may be used by the licensee: "Alternative (1)," a nationwide license with the technology platform to be determined by the winning bidder; "Alternative (2)," a set of regional licenses for use with the LTE technology platform; and "Alternative (3)," a set of regional licenses for use with the WiMAX technology platform. Our goal is to provide for an auction in which applicants could place bids for license(s) covering the geographic area of their choice (nationwide and regional) and subject to specific provisions regarding the required technology platform. More specifically, we seek to provide certainty to bidders for regional licenses about which technology platform would be required if they become winning bidders. Thus, we tentatively conclude that we should enable an auction in which applicants can place bids that represent the values they assign to licenses for the alternative geographic areas and alternative technology platform requirements described above.

246. In furtherance of our primary goal of promoting the widest possible population coverage by D Block license(s) subject to the public-private partnership conditions, we tentatively conclude, as an initial matter, that we will not award any licenses unless the total population covered by licenses with high bids meets or exceeds fifty percent (50%) of the U.S. population. Setting the requirement at half of the population should help assure that sufficient licenses are assigned after the next auction to facilitate the ultimate success of a nationwide interoperable broadband network for public safety. We will direct the Wireless Telecommunications Bureau, as part of its pre-auction process, to describe how this requirement will be implemented in the context of the final auction procedures. If provisionally winning bids do not meet this requirement, the auction will be cancelled and no D Block licenses will be awarded based on the results of the auction.

247. We further tentatively conclude that, if the fifty percent (50%) population threshold is met, winning bidders will be determined according to the following criteria. If there is no nationwide bid and there are not high bids on all regional licenses in either set, the bidder(s) with high bid(s) on the D Block license(s) in the technology alternative covering the greatest aggregate population will become the winning bidders after the close of bidding. Similarly, if there is a nationwide bid but not high bids on all licenses in either regional set, the bidder for the nationwide license will become the winning bidder by covering the greatest aggregate population. In the event that there is a bid on the nationwide license and on all licenses in either regional set, the set of licenses with the highest aggregate gross bid(s) will become the winning bidder(s). Similarly, in the event that there is no nationwide bid and the greatest aggregate population is covered equally by the high bids in the two sets of regional licenses, the high bidder(s) for license(s) in the set with the highest aggregate gross bid(s) will become the winning bidder(s). Thus, we will look first to population coverage to determine the winning set of licenses, and to the highest aggregate bid amounts only if the population coverage is equal.⁴⁷⁷

248. We further tentatively conclude that the Wireless Telecommunications Bureau should establish auction procedures that will encourage bidding on licenses covering as much population as possible, including procedures to reduce minimum opening bids on unsold regional licenses during bidding. In particular, we tentatively conclude that the Bureau should lower certain minimum opening bids to the levels set out below if either of the following two triggers is tripped.

249. First, if there is a bid for the nationwide license, neither alternative set of regional licenses has received bids on all 58 licenses, and the sum of the provisionally winning bids for either set of regional licenses is greater than the amount of the nationwide license bid, then the Bureau will lower the minimum opening bids for the regional licenses that do not have bids. Second, if there is not a bid for

⁴⁷⁷ For purposes of determining the extent of population covered by licenses with high bids, the Commission would treat the license for the Gulf of Mexico PSR as having population. Thus, if two sets of licenses otherwise cover the same aggregate population and only one of the license sets includes the Gulf of Mexico PSR, the set of licenses that includes the Gulf of Mexico PSR will be the winning set, regardless of which set has the highest aggregate bid amount. The nationwide license includes the Gulf of Mexico PSR.

the nationwide license and there are bids in either set of regional licenses that cover at least half the nation's population, then the Bureau will lower the minimum opening bids for the regional licenses that do not have bids.

250. In particular, in these circumstances, we propose that the Bureau would lower the relevant minimum opening bids by setting new minimum opening bids for licenses without bids at \$0.005 per megahertz per population (MHz-pop). If either of the regional licenses for the Gulf of Mexico does not have a bid, its minimum opening bid will be reduced to \$2,500. Under this proposal, the Bureau would not further reduce minimum opening bids during the auction.

251. We also seek comment on alternative triggers for the reduction of minimum opening bids. For instance, we seek comment on whether, absent a bid on the nationwide license, there is another level at which the aggregate bids for either set of regional licenses should trigger a reduction in minimum opening bids for regional licenses without bids.

252. We seek comment on all of these tentative conclusions and on whether such an auction process will best serve the public interest in achieving a nationwide interoperable public safety broadband network. We also seek comment on whether there are other auction provisions we could establish that would promote the widest possible coverage of the nation's population by D Block licensees, while providing meaningful opportunities for regional bidders that would create interoperable regional networks. Further, we seek comment on whether the approach suggested by our tentative conclusions is consistent with the Commission's long-held policy of technology neutrality. To the extent commenters believe it is not, we ask that they provide specific input on modifications we could make that would advance technology neutrality. For example, would it be feasible to offer a fourth set of regional licenses that would allow the licensees to choose their own technology? What are the advantages and disadvantages of including such an additional set of regional licenses? Specifically, if licensees can choose their own technologies, how could we assure that regional deployments on licenses offered in the fourth regional set will be fully interoperable consistent with our fundamental premise that bridging, gateways, and/or IP patches are insufficient for this purpose? Finally, we seek comment on when the auction should commence.

253. While the *700 MHz Second Further Notice* did not seek comment on the details of auction design, some commenters noted their objections to the possibility of package bidding. United States Cellular opposes the use of package bidding in any auction to license the D Block subject to the Public Private Partnership.⁴⁷⁸ The Rural Telecommunications Group also opposed package bidding.⁴⁷⁹

254. We tentatively conclude that the Wireless Telecommunications Bureau should consider specific procedures for package bidding with respect to regional licenses. As discussed elsewhere, we tentatively conclude that we should offer regional licenses in order to enhance the likelihood that an applicant will seek licenses covering as much population as possible. While regional licenses offer applicants greater flexibility than a nationwide license, and bidders can win multiple regional licenses, some potential applicants may prefer to be able to place single bids covering geographic areas that are significantly larger than the roughly state-sized PSRs. Accordingly, we tentatively conclude that we should direct the Wireless Telecommunications Bureau, as part of its pre-auction process, to seek comment on and establish specific procedures for package bidding for regional licenses that might

⁴⁷⁸ US Cellular Comments at 21-22. Coleman Bazelon asserted with respect to Auction 73 that package bidding and anonymous bidding created difficulties for smaller bidders. See Bazelon Comments, Attachment at 11-14. Cox Communications opposes the use of anonymous bidding in any auction to license D Block that is not subject to the Public Private Partnership. Cox Communications Comments at 13-14. MetroPCS opposes the use of package bidding in any auction to license D Block that is not subject to the Public Private Partnership. MetroPCS Comments at 21-22.

⁴⁷⁹ RTG Comments at 11.

encourage bidding on licenses that cover as much population as possible. With respect to the concerns raised by commenters, we note that consistent with the Commission's conclusion in the *Second Report and Order*, we anticipate that the Wireless Telecommunications Bureau can implement procedures for an auction with package bidding that will not impose disadvantages on parties that wish to bid on individual licenses offered and direct that it consider procedures that further that objective.⁴⁸⁰

255. Because of the critical importance of achieving a truly nationwide interoperable wireless broadband network for public safety, we propose to take prompt action to assign any licenses remaining unsold if an auction meets the minimum coverage requirement and yet there is no winning bidder in some regions. Any remaining unsold licenses after an auction satisfies the minimum coverage requirement will be regional licenses conditioned on the use of a particular broadband technology platform. Such licenses will be unsold if no party is willing to make the minimum opening bid for the license, notwithstanding the Commission's reduction of the minimum opening bid to \$0.005 per megahertz per population (MHz-pop). Furthermore, regional licenses subject to the Public/Private Partnership will have been sold that cover at least fifty percent (50%) of the nation's population, consistent with the minimum coverage requirement. Thus, licenses sold will provide a foundation for an interoperable public safety wireless broadband network and yet the network will not be nationwide because some regional licenses remain unsold, despite very low minimum opening bids. In order to realize the benefits of a truly nationwide network, we propose that under such unique circumstances, we tentatively conclude that the Commission should depart from its standard approach of offering commercial licenses to the applicant making the highest bid without reference to the applicant's particular business plan and instead conduct a Request for Proposal (RFP) process, incorporating consideration of applicant's proposals together with their bids.⁴⁸¹

256. One possible RFP process under such circumstances would be to request the submission of detailed proposals and bids from would-be licensees regarding how they would use the regional license to deploy an interoperable broadband network useable for public safety in the applicable region, in conjunction with the D block licenses already won at the auction. We would determine the contents of the request in consultation with the PSBL, the applicable regional public safety planning committee, and other parties, including public commenters, as may be appropriate. The RFP would specify the license being offered, the applicable Commission rules, any additional requirements or modifications appropriate to the region, and specify the process by which any proposal(s) and bids would be evaluated. Based on this process, we would award the license to the qualified party with the proposal and bid that best meet the requirements. The terms of the proposal would then be incorporated into an NSA for the region. We seek comment on this approach.

257. Alternatively, we could re-allocate the spectrum so that it can be assigned to the Public Safety Broadband Licensee. The PSBL would then request the submission of detailed proposals from would-be licensees regarding how they would deploy an interoperable broadband network useable for public safety in the applicable region in partnership with the D block licenses won at the auction. We seek comment on these options.

258. We seek comment as well on whether these approaches would be consistent with the Commission's obligations under Sections 309(j) and 337(a) with respect to the allocation of spectrum and the method of assigning D Block licenses. We believe that, at least once the Commission has put up for auction two times the entire D Block portion of the 36 megahertz of spectrum allocated for commercial use under Section 337 and assigned a substantial number of commercial licenses in this Block through competitive bidding to cover at least half of the country, at a time when the DTV transition has already

⁴⁸⁰ See *Second Report and Order*, 22 FCC Rcd at 15397 ¶ 290.

⁴⁸¹ Because this approach does not involve any procurement by or on behalf of the federal government, the use of the term "RFP" would not imply any obligation on the part of the federal government to apply the Federal Acquisition Regulations, 48 C.F.R. Chapter 1, or any other government contracting requirements.

taken place and all the rest of the 36 megahertz of spectrum has been made available by auction and nearly all subsequently licensed, the Commission would have satisfied the allocation and assignment obligations of Section 337(a) for those D Block licenses that have failed to sell. In this regard, we note that the circumstances here differ significantly from those that informed our conclusion in the *Second Report and Order* that we lacked authority under Section 337 at that time to reallocate commercial use guard band spectrum to public safety.

b. Eligibility Restrictions

259. Comments. Some public safety and commercial commenters, including public safety entities, equipment manufacturers and large commercial wireless providers, oppose adopting eligibility restrictions on participation in an auction to license the D Block subject to the Public Private Partnership. PSST expressly refrains from taking a position on the issue. Other commenters, primarily smaller commercial entities as well as public interest commenter PISC, support such a proposal.

260. So long as the Public Private Partnership is retained, NATOA et al. do not support any restrictions on eligibility of otherwise qualified potential licensees to bid for the D Block license.⁴⁸² APCO contends that the Commission should not impose eligibility restrictions that are unrelated to the goal of developing a national public safety broadband network.⁴⁸³

261. The Consumer Electronics Association opposes any restriction on bidding eligibility that might preclude incumbents from bidding, given the incumbents' qualifications and experience.⁴⁸⁴ Motorola opines that given the significant investment required to develop and deploy a public-safety grade broadband network, excluding current spectrum holders will put the entire effort in jeopardy.⁴⁸⁵ Qualcomm contends that the lack of bidding on D Block in Auction 73 counsels against any restrictions on eligibility in a subsequent auction.⁴⁸⁶

262. Both AT&T and Verizon Wireless also oppose eligibility restrictions, noting that larger wireless providers are precisely the parties best positioned to create a new public safety network.⁴⁸⁷

263. PSST does not take a position on eligibility restrictions at this time.⁴⁸⁸ However, PSST advocates that the Commission attempt to assure itself of the intentions of AT&T and Verizon Wireless, in order to avoid an outcome where the possibility that those entities might participate in the auction deters other participants, notwithstanding a lack of interest by either AT&T or Verizon Wireless.⁴⁸⁹

264. Claiming that AT&T, Sprint, T-Mobile, and Verizon Wireless currently have a collective "chokehold" on the wireless services industry and that there is a low likelihood that new entrants will have any opportunity other than the D Block, Council Tree Communications asserts that AT&T, Sprint, T-Mobile and Verizon Wireless should be prohibited from participating in an auction to license the D Block.⁴⁹⁰ For the same reasons, Council Tree advocates use of the "attributable interest" standard

⁴⁸² NATOA et al. Comments at 21.

⁴⁸³ APCO Comments at 38.

⁴⁸⁴ CEA Comments at 5.

⁴⁸⁵ Motorola Comments at 17.

⁴⁸⁶ Qualcomm Comments at 11-12.

⁴⁸⁷ AT&T Reply Comments at 12; Verizon Wireless Comments at 22.

⁴⁸⁸ PSST Comments at 43. PSST did not amend this position in its Reply Comments. See, generally, PSST Reply Comments.

⁴⁸⁹ PSST Comments at 44-45.

⁴⁹⁰ Council Tree Communications Comments at 14.

previously used as part of the former spectrum aggregation limit to preclude participation by parties in which one of the barred carriers has an attributable interest.⁴⁹¹

265. Cellular South “strongly encourages” the Commission to limit participation in the D Block auction by parties who have significant access to 700 MHz spectrum.⁴⁹² In particular, Cellular South endorses the use of the Commission’s spectrum aggregation screen used for wireless transactions in connection with licensing of the D Block.⁴⁹³ Similarly, Leap proposes that the Commission bar entities that won a “substantial amount of spectrum” in Auction 73 from participating in an auction to license the D Block.⁴⁹⁴ More specifically, Leap proposes that any current license holder or winning bidder capable of reaching more than half of the nation’s population with its 700 MHz spectrum be prohibited from participating in an auction to license D Block.⁴⁹⁵ NTCH proposes that parties with more than 20 megahertz of 700 MHz spectrum in a given market, primarily AT&T and Verizon Wireless, should be precluded from bidding on the D Block in that market.⁴⁹⁶

266. Citing conditions for competition that it contends worsened as a result of the outcome of Auction 73, PISC advocates the adoption of a spectrum cap of 95 megahertz in a market, as well as the grant of its pending petition for reconsideration which would preclude the C Block licensee from holding the D Block license.⁴⁹⁷ In the current proceeding, the Rural Telecommunications Group advocates a per county spectrum cap of 24 megahertz of 700 MHz band spectrum, while it seeks in a separate proceeding to impose a general spectrum cap on spectrum below 2.3 GHz.⁴⁹⁸ These restrictions on eligibility to hold a license would go beyond the bidding eligibility restrictions contemplated by the Commission in the *700 MHz Second Further Notice*.

267. Discussion. We tentatively conclude that we should not adopt any restriction on the eligibility to bid for D Block licenses by any entity otherwise eligible to be a D Block licensee based on its spectrum holdings, whether in the 700 MHz band or any other band.⁴⁹⁹ The *700 MHz Second Further Notice of Proposed Rulemaking* sought comment on whether a restriction on eligibility to bid in an auction to license the D Block might increase the likelihood that a new entrant to nationwide service in the 700 MHz band would have an opportunity to do so. We tentatively conclude that the public interest in maximizing the likelihood that a nationwide interoperable broadband network meeting the needs of public safety will be built outweighs any possibility that a restriction on eligibility to bid in an auction to license the D Block pursuant to the Public Private Partnership will increase the likelihood that a new nationwide service provider will emerge. We note that this tentative conclusion does not itself bar any new provider from participating in an auction to license the D Block. Moreover, to the extent incumbent providers have cost advantages over a new provider with respect to providing nationwide service that meets the needs of public safety, we tentatively conclude it better serves the public interest to enable those savings to be put to use in facilitating the provision of such service, rather than by requiring the D Block winner

⁴⁹¹ Council Tree Communications Comments at 16.

⁴⁹² Cellular South Comments at 2.

⁴⁹³ Cellular South Comments at 3.

⁴⁹⁴ Leap Comments at 4.

⁴⁹⁵ Leap Comments at 7.

⁴⁹⁶ NTCH Comments at 13.

⁴⁹⁷ PISC Comments at 6-7.

⁴⁹⁸ RTG Comments at 8-11.

⁴⁹⁹ As we discuss elsewhere, we tentatively conclude that we should establish eligibility conditions for any advisor to the Public Safety Broadband Licensee.

to assume additional costs.

268. We decline to adopt PSST's suggestion that we seek a commitment from nationwide incumbent service providers regarding their intentions to participate in an auction to license D Block. We recognize the PSST's concern that uncertainty regarding potential competition from incumbents in an auction conceivably could inhibit other potential bidders, notwithstanding an ultimate lack of interest by incumbent nationwide service providers. However, we believe that parties dissuaded from even applying to participate in an auction by such concerns are unlikely to have the commitment or the resources essential to providing service as a D Block licensee. Moreover, we recognize that incumbent nationwide service providers may be unable to determine their ultimate intentions regarding their interest in the D Block with certainty far enough in advance of an auction for their statements to be of use to other applicants. We do not want to foreclose the possibility that an incumbent carrier might become a licensee by requiring them to make an earlier determination than other parties regarding their interest in doing so. Accordingly, we decline to adopt PSST's suggestion that we seek a commitment from nationwide incumbent service providers regarding their intentions to participate in an auction to license D Block.

269. The *Second Further Notice* did not seek comment on a spectrum cap or any limitation on the ability of parties to hold licenses for the D Block. As many commenters noted, in the *Second Report and Order*, the Commission considered and rejected restricting eligibility to hold licenses in the 700 MHz band based on competition in the market for broadband services.⁵⁰⁰ While the spectrum holdings of parties have changed in the period since that decision, none of the commenters demonstrate that these changes have resulted in any change in the market for broadband services that mandates revisiting our decision. Thus, even if within the scope of this proceeding, we do not believe the record before us supports any spectrum cap applicable to the D Block at this time. Our conclusion in this regard is without prejudice to our review of the record in any other proceedings regarding potential spectrum caps.

c. Reserve Price

270. Comments. As to the level of any reserve price used in an auction to license the D Block, the consensus view among commenters is that the reserve should be reduced or even eliminated. Numerous commenters, from Council Tree Communications to Verizon Wireless to APCO, supported significantly reducing or eliminating a reserve price altogether. Some commenters, such as Jon Peha, Coleman Bazelon, and Northrop Grumman, even supported eliminating a minimum opening bid. MetroPCS was the only commenter that supported an aggressive reserve price in excess of the minimum opening bid.

271. NATOA et al. assert that, so long as the Public Private Partnership is retained, there is no need for a reserve price in light of the revenues recovered in Auction 73.⁵⁰¹

272. Ericson asserts that the public interest would be served by a reserve price just high enough to assure that a winning bidder has an economic stake in successfully negotiating an NSA but not one linked to the potential value of the D Block absent the Public Private Partnership.⁵⁰² Northrop Grumman asserts that given the financial success of Auction 73 and the need to attract additional interest in the D Block, neither a minimum opening bid nor a reserve price would serve the public interest in an auction to license D Block.⁵⁰³

⁵⁰⁰ Parties have filed petitions for reconsideration of that decision, which remain pending before the Commission. See, e.g., PISC Petition for Reconsideration at 2.

⁵⁰¹ NATOA et al. Comments at 20-21.

⁵⁰² Ericson Comments at 33.

⁵⁰³ Northrop Grumman Comments at 9.

273. Individual commenters Jon Peha and Coleman Bazelon both contend that the D Block winner may need subsidies in order to construct the Public Safety Network and, accordingly, there should be no reserve price.⁵⁰⁴

274. We note that three academic commenters address the role of the reserve price rather than its level. Sandro Brusco, Giuseppe Lopomo, and Leslie M. Marx (Brusco et al.) address the reserve price from the perspective of using it in order to determine whether to impose additional requirements on the licensee. They contend that meeting a reserve price is likely to be a poor mechanism for balancing public and private interests and for identifying the highest valuing user of the spectrum.⁵⁰⁵ As an alternative mechanism, Brusco et al. suggest that the Commission consider using an "exclusive buyer mechanism" in which bidders compete for the right to choose between the license with requirements or without requirements (or with fewer requirements), with a discount on a bidder's bid if it chooses to accept the requirements. In such a mechanism, the Commission would set the bid discount to reflect the public benefit of the requirements.⁵⁰⁶ Given our tentative conclusion to retain the D Block license requirements regardless of the bidding in the next auction, this analysis is not relevant to our current decisions.

275. Discussion. We tentatively conclude that we should direct the Wireless Telecommunications Bureau to not adopt a reserve price greater than any minimum opening bid or bids. The successful creation of a nationwide interoperable broadband network meeting the needs of public safety will be of enormous value to the public, quite possibly exceeding the value of any potential revenue for the public from the sale of licenses for the D Block. Thus, in contrast to our decisions with respect to Blocks A, B, C, and E in Auction 73, we tentatively conclude that it is not in the public interest to adopt a reserve price beyond the minimum opening bid to assure that the adoption of the Public Private Partnership does not have an excessive negative effect on the value of the public spectrum resource. In addition, as many commenters note, the results of Auction 73 more than satisfied the revenue expectations of the Congress with respect to the auction of recovered analog spectrum, as set forth in the DTV Act. Furthermore, a reserve price may have negative consequences by discouraging otherwise viable bidders from competing in an auction. Accordingly, no reserve price beyond the minimum opening bid for the next auction to license the D Block is needed to serve a larger policy goal, notwithstanding our contrary decision in Auction 73. At the same time, we also tentatively conclude that it is in the public interest to direct the Wireless Telecommunications Bureau to establish initial minimum opening bids for each set of alternative D Block licenses that equal or aggregate approximately \$750 million.⁵⁰⁷ We seek comment on our tentative conclusions, including whether the proposed aggregate minimum opening bids should be lowered.

d. Impermissible Material Relationships for Designated Entities

276. Comments. Only a select group of commenters addressed this issue. Council Tree Communications, MetroPCS, NATOA et al., and Wirefree Partners all addressed this issue.

277. NATOA et al. favor codifying the waiver, so long as the Public Private Partnership is retained, so as to facilitate the participation of smaller bidders.⁵⁰⁸ Council Tree Communications favors codifying the waiver.⁵⁰⁹ In addition, Council Tree Communications proposes that the Commission waive

⁵⁰⁴ Bazelon Comments at 2.

⁵⁰⁵ Brusco et al. Comments at 2-4.

⁵⁰⁶ Brusco et al. Comments at 5.

⁵⁰⁷ Appendix F provides proposed minimum opening bids for each of the 58 PSRs, which total approximately \$750 million.

⁵⁰⁸ NATOA et al. Comments at 21.

⁵⁰⁹ Council Tree Communications Comments at 11.

all designated entity rule modifications adopted since 2006, in part due to Council Tree Communications pending litigation challenging those rule changes.⁵¹⁰ Wirefree likewise supports codifying the waiver in connection with making other changes to the designated entity rules.⁵¹¹ Wirefree would liberalize the designated entity rules by returning to a pre-2000 structure of requiring that qualifying entities maintain a minimum equity interest in the applicant while not attributing revenues of other interest holders to the applicant.⁵¹²

278. MetroPCS opposes codifying or even retaining the waiver. MetroPCS argues generally that the Commission should not retain the Public Private Partnership that is the basis of the current waiver.⁵¹³ Consistent with its view that the Public Private Partnership will make extreme demands on the D Block licensee's financial resources, MetroPCS argues that the Commission should not offer bidding credits to applicants for D Block license(s).⁵¹⁴ Further, MetroPCS contends that a D Block exemption from the impermissible material relationship rule is not supported by any "unique or unusual circumstances surrounding this spectrum."⁵¹⁵

279. Discussion. We tentatively conclude that we should codify the substance of the previously granted waiver of the impermissible material relationship rule so that a D Block applicant or licensee with lease or resale (including wholesale) arrangements with other entities involving more than 50 percent of the spectrum capacity of a D Block license will not be ineligible for designated entity benefits solely on the basis of such arrangements.⁵¹⁶ The waiver of the rule was premised on the fact that certain aspects of the Commission's D Block rules with respect to the Public Private Partnership provided adequate safeguards against the abuses the impermissible material relationship rule was intended to prevent. We do not believe that any of the changes in the D Block rules we tentatively propose today invalidate that premise. Accordingly, we disagree with MetroPCS's contention that there are no unique or unusual circumstances surrounding this spectrum and tentatively conclude that we should codify the waiver.⁵¹⁷ We seek comment on this tentative conclusion.

280. We further tentatively conclude that we should not revisit more generally the rules regarding designated entity eligibility as proposed by Council Tree Communications or Wirefree. Without prejudging those proposals, it is more appropriate to address the rules regarding designated entity eligibility generally in a separate proceeding. The Commission can consider its general designated entity eligibility rules in various pending proceedings, including a pending Further Notice of Proposed Rulemaking and pending petitions for reconsideration arising from the Commission's most recent

⁵¹⁰ Council Tree Communications Comments at 13.

⁵¹¹ Wirefree Comments at 9-10.

⁵¹² Wirefree Comments at 9-11.

⁵¹³ MetroPCS Comments, *passim*.

⁵¹⁴ MetroPCS Comments at 34-35.

⁵¹⁵ MetroPCS Comments at 36.

⁵¹⁶ If a D Block applicant or licensee utilizes this exception to the impermissible material relationship rule, it still remains subject to our other designated entity eligibility rules, including our controlling interest, unjust enrichment, attributable material relationship, audit, eligibility event and annual reporting rules. *C.f.*, In Re Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License, Order, 22 FCC Rcd. 20354, 20357 ¶8, fn. 21 (2007).

⁵¹⁷ Because this exception does not extend to arrangements for use of the spectrum capacity of licenses *other than* the D Block license, if an applicant or licensee has an impermissible material relationship with respect to the spectrum capacity of any other license(s), the normal operation of the Commission's rules will continue to render it ineligible for designated entity benefits for the D Block license.

revisions to the designated entity program. We also reject the notion that Council Tree Communications' attempt to litigate the Commission's existing designated entity rules, which the Commission adopted to further the public interest and applied in the recent auctions of Advanced Wireless Services and 700 MHz licenses, is any basis for suspending those rules in the next auction to license the D Block spectrum.

e. Default Payment Amounts

281. Comments. Few commenters addressed whether to modify the default payment outside of the context of a failed attempt to negotiate an NSA. Andrew Seybold states without further discussion that "the penalty clause should be removed."⁵¹⁸ Qualcomm asserts that the default rules are among rules that must be revised but suggests only that the Commission wait until the close of the comment cycle in response to the 700 MHz 2d FNPRM and then convene all affected stakeholders in a meeting or meetings to ensure that the revised rules strike the right balance.⁵¹⁹

282. Discussion. We tentatively conclude that the Commission's existing rules governing the amount of the default payment are generally appropriate for circumstances in which a D Block winning bidder may be liable for a default payment.⁵²⁰ However, we also tentatively conclude that for an auction of alternative D Block licenses, the Commission should apply the same default payment amount rule regardless of whether or not it package bidding is utilized. Currently, our rules provide that the Bureau, prior to auctions without combinatorial bidding, *i.e.*, package bidding, shall establish the percentage for the additional payment component of a default payment between 3 and 20 percent. In auctions with combinatorial or package bidding, the Commission's rules provide that this percentage shall be 25 percent. The Commission established this higher percentage for package bidding auctions because of the potential inter-relatedness of bids in such an auction. Because each bidder's bid in a package bidding auction is combined with bids on other licenses to determine the group of winning bids, any one bid may affect which bids win other licenses. Consequently, the Commission concluded that it is particularly important to discourage defaults in package bidding auctions. As we have discussed elsewhere, bids in an auction of alternative licenses are also inter-related, regardless of whether package bidding is available. However, we tentatively conclude that in an auction of alternative licenses for the D Block subject to the 700 MHz Public/Private Partnership, whether or not package bidding procedures are implemented, we should direct the Wireless Telecommunications Bureau to set the percentage of the additional payment for defaults at between 3 and 20 percent, the same range for an auction without package bidding. We tentatively conclude that this range will enable the Bureau to set an appropriate percentage as part of its pre-auction process, taking into account both the special circumstances of the D Block and the final details of the auction process to be used. We seek comment on this tentative conclusion.

f. Other Competitive Bidding Rules

283. Background. In the *Second Further Notice*, we sought comment on other potential changes to our competitive bidding rules, potentially to assist new entrants or to serve other public interest purposes.

284. Comments. Sprint proposes a system of performance-based bidding credits, in which applicants agreeing to meet any of up to 5 potential stricter performance requirements could receive bidding credits, subject to a requirement to repay the credit, with interest, if the applicant does not meet the stricter standards. AT&T opposes this proposal, characterizing it as "[a]llowing carriers to eviscerate

⁵¹⁸ Andrew Seybold Comments at 7.

⁵¹⁹ Qualcomm Comments at 11.

⁵²⁰ As discussed elsewhere, we have concluded tentatively that our default payment rules should be modified with respect to the circumstances under which they apply to D Block winning bidders following a failure to negotiate an NSA with the PSBL that is acceptable to the Commission.

[minimum] standards by paying additional money.”⁵²¹ Commenter Andrew Seybold proposes that an auction be conducted to determine the party that will manage the Public Safety Network, with incumbent carriers constructing the network in response to other incentives, such as tax credits and access to the network.⁵²² In this context, he advocates that the Commission lift its anti-collusion rule, in order to enable communications among incumbent carriers and prospective network managers.⁵²³ As part of its own alternative proposal, NTCH suggests that the Commission lift the anti-collusion rule prior to the auction, apparently unaware that the rule does not apply until would-be licensees file applications to participate in the auction.⁵²⁴ NATOA also suggests “relaxing” the Commission’s anti-collusion rules, apparently under the mistaken belief that the rules prohibit the creation of bidding consortia prior to the auction.⁵²⁵ United States Cellular opposes the use of anonymous bidding in any auction to license the D Block subject to the Public Private Partnership.⁵²⁶ As noted above, Council Tree Communications and Wirefree Partners suggest several changes to the Commission’s designated entity program in order to encourage participation by designated entities.

285. Discussion. We seek further comment with respect to the approach advocated by Sprint. As discussed elsewhere in this Third Further Notice, we have reached tentative conclusions with respect to the appropriate level of performance mandates. We ask that commenters address whether we should modify these performance mandates by offering bidding credits to applicants willing to commit themselves to meeting greater requirements. In light of the mandates proposed herein, with respect to which mandates should the Commission offer bidding credits for commitments to exceed the requirements? What would be the level by which the mandate should be exceed before a credit should be offered? What amount of credit is appropriate for a particular performance requirement? Should the credit only be refunded from the full bid price after the greater requirement is met? Or should the commitment be sufficient to receive a reduction in the bid amount, subject to repayment if the commitment is not fulfilled? Does the appropriate approach change depending on the particular performance requirement?

286. We tentatively conclude that we should not make any of the changes commenters propose to the Commission’s competitive bidding rules. As our anti-collusion rule applies solely after parties file applications to participate in bidding for Commission licenses, we tentatively conclude bidding consortia may form prior to the application deadline without any relaxation of the rule. Furthermore, in light of our tentative conclusion that the winning bidder for a D Block license should negotiate an NSA only after the conclusion of the auction, there is no reason to relax the anti-collusion rule to permit communications during the auction in connection with the terms of the NSA. Commenters’ proposals regarding certain details of auction design, such as anonymous bidding, are best addressed in

⁵²¹ AT&T Reply Comments at 21.

⁵²² Andrew Seybold Comments at 4.

⁵²³ Andrew Seybold Comments at 5.

⁵²⁴ NTCH Comments at 14.

⁵²⁵ NATOA *et al.* Comments at 21.

⁵²⁶ US Cellular Comments at 21-22. Coleman Bazelon asserted with respect to Auction 73 that package bidding and anonymous bidding created difficulties for smaller bidders. See Bazelon Comments, attachment at 11-14. Cox Communications opposes the use of anonymous bidding in any auction to license D Block that is not subject to the Public Private Partnership. Cox Communications Comments at 13-14. MetroPCS opposes the use of package bidding in any auction to license D Block that is not subject to the Public Private Partnership. MetroPCS Comments at 21-22.

the context of the Wireless Telecommunication Bureau's pre-auction notice and comment process.⁵²⁷ Finally, for reasons discussed above, we will not consider in this proceeding the wholesale changes to our designated entity eligibility rules proposed by Council Tree Communications and Wirefree Partners.

8. Safeguards for Protection of Public Safety Service

287. Background. In the *Second Report and Order*, we established a number of measures to safeguard the interests of public safety on an ongoing basis following the execution of the NSA. These measures included: (1) requirements related to the organization and structure of the 700 MHz Public/Private Partnership; (2) a prohibition on discontinuance of service provided to public safety entities; (3) special remedies in the event that the D Block licensee or Public Safety Broadband Licensee fail to comply with either the Commission's rules or the terms of the NSA; (4) a special, exclusive process for resolving any disputes related to the execution of the terms of the NSA; and (5) ongoing reporting obligations.⁵²⁸ These measures addressed concerns that problems arising after the execution of the NSA, whether financial or otherwise, might threaten the build-out of the network or the provision of services to public safety, or that financial problems might lead the D Block licensee to draw its license or the network assets into a bankruptcy proceeding. We did not specifically propose any modifications to these rules in the *Second Further Notice*.

288. Discussion. We tentatively conclude that we should retain these rules to safeguard the interests of public safety on an ongoing basis following the execution of the NSA. We continue to believe that the measures we previously adopted are necessary to address the possibility that problems could arise in the implementation of the NSA or the operation of the common network, and that they will protect the interests of public safety without compromising the commercial viability of the 700 MHz Public/Private Partnership.⁵²⁹

289. We also note that, in addition to the quarterly reporting requirements adopted in the *Second Report and Order*, we have proposed elsewhere in this Third Further Notice that the D Block licensee be required to provide to the Public Safety Broadband Licensee monthly network usage statistics. We find that these existing and newly proposed reporting requirements address the concerns of some commenters regarding the need for oversight of the D Block licensee's operations. We seek comment on these tentative conclusions.

290. In addition, we seek comment on whether a winning bidder for any D Block license should post financial security to ensure that the network will be constructed pursuant to the terms of the NSA and the Commission's rules. In particular, we seek comment on whether a winning bidder for D Block licenses should be required to obtain an irrevocable standby letter of credit ("LOC") no later than the date on which its executed NSA is submitted to the Commission. We also seek comment on whether only applicants that do not meet certain criteria should be subject to this requirement. For example, should we establish criteria, based on bond rating, market capitalization, or debt/equity ratios (combined with minimum levels of available capital) that, if not met, would make an LOC necessary?

291. We seek comment on the amount of the LOC necessary to ensure uninterrupted

⁵²⁷ The Commission detailed the public interest reasons underlying its decision to utilize anonymous bidding in for the auction of 700 MHz Band licenses in the *Second Report and Order* and has used anonymous bidding in a number of Commission auctions for wireless services licenses. Accordingly, absent good cause, we expect that anonymous bidding likely will be employed in the next auction of the D Block.

⁵²⁸ *Second Report and Order*, 22 FCC Rcd at 15467-71 ¶¶ 517-530.

⁵²⁹ But see Letter from Warren G. Lavey, US Cellular, to Marlene H. Dortch, Secretary, FCC, WT Docket 06-150, PS Docket 06-229, filed Sept. 17, 2008 (asserting that the requirement to form bankruptcy remote special entities "may be detrimental to the rapid, efficient deployment and operation of networks by many potential D Block licensees").

construction of the public safety network, as well as the length of time that the LOC should remain in place. For example, the amount of the LOC could be determined on the basis of estimated annual budgets that could accompany the build-out schedule required as part of the NSA, or we could simply require a specific dollar figure for the LOC in an amount that would ensure that construction could proceed for a given amount of time. Should the amount of an initial LOC, or a subsequent LOC, also ensure the continuing maintenance and operation of the network? Under what circumstances should the D Block licensee be required to replenish the LOC?

292. We also seek comment on whether the LOC should be issued in favor of a trustee and the Commission. What events would constitute a default by the D Block licensee that would allow the trustee or the Commission to make a draw on the entire remaining amount of the LOC? Further, we note our intent that, in the event of bankruptcy, the LOC should be insulated from claims other than the draws authorized here for the construction and operation of the network. We seek comment on provisions we might adopt to provide safeguards to this effect.⁵³⁰

293. As an alternative to an LOC, we seek comment on whether we should require parties to obtain performance bonds covering the cost of network construction or operation. We also seek comment on the types of requirements that bond issuers might impose and whether such requirements are consistent with the public interest in permitting a range of qualified parties to seek D Block licenses. We also seek comment on the relative merits of performance bonds and LOCs and the extent to which performance bonds, in the event of the D Block Licensee's bankruptcy, might frustrate our goal of ensuring timely buildout of the network. We also seek comment on whether there are other protections that the Commission should reasonably seek to ascertain the financial viability of the winning bidder, and ensure construction of the network and its subsequent operation.

9. Local Build-Out Options

294. Background. In the *Second Report and Order*, we adopted provisions for early build-out in areas that do and do not have a build-out commitment from the D Block licensee. Under these provisions, for areas with a build-out commitment, public safety entities can, with pre-approval from the Public Safety Broadband Licensee, construct at its own expense a broadband network in that area that conforms to the requirements and specifications of the NSA, and must transfer such network to the D Block licensee for integration into the Shared Wireless Broadband Network. In this case, the public safety entity's compensation would be limited to the costs the D Block licensee would have incurred had it constructed the network in that area itself. Alternatively, rather than constructing the network at its own cost, the public safety entity could provide the D Block licensee with the funds necessary to do so.⁵³¹ For areas lacking a build-out commitment from the D Block licensee, public safety entities may, at their own expense, construct and operate an exclusive broadband network that is fully interoperable with the Shared Wireless Broadband Network, pursuant to a spectrum leasing arrangement with the Public Safety Broadband Licensee, and after the Public Safety Broadband Licensee first offers the D Block licensee the option of constructing a network in that area itself.⁵³²

⁵³⁰ For example, we could require as a condition of the Public/Private Partnership License that any winning bidder for a D Block license and related parties must first provide the Commission with a legal opinion letter that would state, subject only to customary assumptions, limitations and qualifications, that in a proceeding under Title 11 of the United States Code, 11 U.S.C. Section 101 et seq. (the "Bankruptcy Code"), in which the winning bidder is the debtor, the bankruptcy court would not treat the Letter of Credit or proceeds of the Letter of Credit as property of the winning bidder's bankruptcy estate (or the bankruptcy estate of any other bidder-related entity requesting the issuance of the LOC) under Section 541 of the Bankruptcy Code.

⁵³¹ See 47 C.F.R. § 90.1430(b)(1)-(4).

⁵³² See 47 C.F.R. § 90.1430(b)(5).

295. Comments. The *Second Further Notice* did not specifically seek comment on changes to the rules on local public safety build-out. However, some commenters advocated for greater flexibility or autonomy in building out their own networks in the 700 MHz public safety broadband spectrum.⁵³³ APCO cautions that “while some accommodation for certain local deployments in the context of a national license is necessary, the Commission must avoid creating yet another situation consisting of multiple islands of robust, but incompatible, public safety networks with vast unserved areas in-between.”⁵³⁴ Similarly, California asserts that “[t]he vision of a nationwide Shared Wireless Broadband Network (SWBN) cannot be realized through the deployment of a multitude of [discrete] systems,” arguing that, given limited economic resources, “[s]ome public safety agencies in urban areas would likely implement broadband networks, but those in rural areas would find it harder to justify building a local or regional broadband network.”⁵³⁵ APCO adds that it continues to support allowing local deployments in areas where the national network is unlikely to be built in the near future, conditioned on eventual integration into the national network.⁵³⁶

296. In an *ex parte* letter, Alcatel-Lucent proposes changes to the local build-out rules that would create an additional option allowing a public safety entity to “enter a spectrum lease agreement with the Public Safety Broadband Licensee and, at its own expense, build out a 700 MHz broadband network in any area where the public-private broadband system has not yet been built.”⁵³⁷ Further, if the D Block licensee “were to seek to build out and operate the public-private network in the same area, it would be required to compensate the public safety entity, based upon commercially reasonable terms, for the value of the network to be integrated into the public-private network.”⁵³⁸ Alcatel-Lucent also argues that “[n]etwork integration and technological evolution are commonplace in commercial mobile networks today, and there is no technological impediment to integration – regardless of technologies.”⁵³⁹

297. Discussion. The local build-out rules we adopted in the *Second Report and Order* afford public safety entities with options to build out broadband networks in advance or in lieu of the D Block licensee’s build-out, so that public safety agencies may obtain use of advanced broadband networks more quickly if their needs so dictate. Particularly in areas that have a build-out commitment, a public safety entity serving that area may already have invested resources in development of plans to deploy a system that is tailored to that area and thus may have options available to accelerate the deployment of the public safety broadband network to its jurisdiction. At the same time, we recognize that since the auction of the D Block did not result in a winning bid, there has been an associated delay in the deployment of the nationwide broadband network, which may impact the extent to which some public safety agencies may desire to construct their own networks before a new auction is completed.

298. In its comments, the District of Columbia (the “District”) made certain requests related to the Regional Wireless Broadband Network (RWBN)⁵⁴⁰ operated by the National Capital Region (NCR)

⁵³³ See Kentucky Wireless Interoperability Executive Committee Comments at 1, San Francisco Comments at 3-4; Philadelphia Comments at 5-8, NYPD Comments at 7-10, District of Columbia Comments at 8-15.

⁵³⁴ APCO Reply Comments at 3.

⁵³⁵ California Comments at 7.

⁵³⁶ See APCO Reply Comments at 3 n.2.

⁵³⁷ Alcatel-Lucent Ex Parte at 2.

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ NCR deployed the RWBN in the 700 MHz Band pursuant to a waiver issued by the PSHSB in January 2007. See Request by National Capital Region for Waiver of the Commission’s Rules to Allow Establishment of a 700 MHz Interoperable Broadband Data Network, WT Docket No. 96-86, *Order*, 22 FCC Rcd 1846 (PSHSB (continued....))

jurisdictions, of which the District is a member.⁵⁴¹ The District indicates that \$8.2 million in Federal grant funds have been expended to build out the RWBN thus far, primarily within the District.⁵⁴² The District further states that it requires certainty to realize a return on further investment in the program.⁵⁴³ Specifically, the District requests that we authorize it to: (i) continue deploying and operating the RWBN for 10 years from the date of any final decision on its request, or require the interoperable shared broadband network into which the RWBN would be incorporated to provide service to District users for 10 years free of charge; (ii) use the 700 MHz broadband spectrum for 10 years from the date of a final decision or until the RWBN is incorporated into the interoperable shared broadband network; (iii) use the RWBN to provide service to as broad a range of users as possible, including municipal, state, and Federal users, as well as other users not typically defined as "first responders;" and (iv) offer service and assign priority levels to specific groups of users as the District deems appropriate and necessary to sustain the RWBN financially.⁵⁴⁴

299. We tentatively decline to grant the District's request. We find that granting independent operational authority for a significant number of years to the District as it requests would undermine the goals of this proceeding and be inconsistent with the tentative proposals we have outlined in this Third Further Notice. Further, if, as the District requests, we require the D Block licensee to provide free service to the District, we are concerned about the resulting impact on the commercial viability of a regional or nationwide D Block licensee. Moreover, as we tentatively concluded elsewhere, the District would not be permitted to provide service to a wider range of users than would be eligible to use the nationwide wireless broadband network. While we appreciate the District's desire to realize a financial return on the investment made in deploying the RWBN, we observe that the NCR on multiple occasions knowingly undertook such action entirely at its own risk.⁵⁴⁵

300. While we tentatively decline to grant the District's specific requests outlined above, we remain sensitive to the fact that the District has expended significant efforts to achieve broadband interoperability in the near-term for public safety users within the District through the RWBN. Therefore, consistent with the *Second Report and Order*, we continue to contemplate that the Public Safety

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2007)(*NCR Waiver Order*). NCR operates the RWBN pursuant to a grant of a request for Special Temporary Authority. See Special Temporary Authorization, File No. 0003149202, Call Sign WQHY489 (Nov. 1, 2007); Special Temporary Authorization, File No. 0003397425, Call Sign WQHY489 (April 28, 2008); Special Temporary Authorization, File No. 0003151108, Call Sign WQHY490 (Nov. 1, 2007); Special Temporary Authorization, File No. 0003397644, Call Sign WQHY490 (April 28, 2008).

⁵⁴¹ The NCR consists of eighteen jurisdictions: The District of Columbia, Montgomery and Prince Georges Counties of Maryland, and the cities of Gaithersburg, Rockville, Takoma Park, Bowie, College Park, and Greenbelt; Arlington, Fairfax, Loudon and Prince William Counties of Virginia, and the cities of Alexandria, Falls Church, Town of Leesburg, Manassas, and Manassas Park. See The National Capital Planning Act of 1952, 40 U.S.C. § 71.

⁵⁴² District Comments at 14.

⁵⁴³ District Comments at 13.

⁵⁴⁴ District Comments at 3.

⁵⁴⁵ As we observed in the *Second Report and Order*, in requesting its waiver to operate its broadband network, NCR specifically represented that it "fully underst[ood] and accept[ed] that as a result of any rulemaking changes the Commission may make, the NCR will have to comply with the results of such rule making," including possible change of its network technology to a different standard or transition to a public safety broadband network managed by a single national licensee. *Second Report and Order* at ¶ 477 (citing *NCR Waiver Order* at 1849 ¶ 8, quoting letter from Bill Butler, NCR Interoperability Program, OCTO-Wireless Programs Group, to Marlene H. Dortch, Secretary, FCC (Jan. 29, 2007) and attached e-mail from Robert L. LeGrande, II, NCR Interoperability Program, Deputy Chief Technology Officer, District of Columbia, to Dana Shaffer, Deputy Chief, Public Safety and Homeland Security Bureau, FCC (Jan. 28, 2007)).

Broadband Licensee will consult NCR in negotiating the schedule for buildout of the shared interoperable network in the area served by the RWBN, and will provide NCR a reasonable amount of time to make any modifications necessary to incorporate the RWBN into the shared network.⁵⁴⁶ In this manner, we hope to minimize any delays that the District might otherwise experience in realizing the benefits of an interoperable broadband network geared towards public safety needs. In addition, to the extent that the D Block licensee building out the NCR areas seeks to utilize any hard assets of the RWBN, such as tower facilities, in constructing the 700 MHz interoperable shared broadband network, NCR may seek appropriate compensation for the use of such assets.

301. As noted above, Alcatel-Lucent advocates changes to our local build-out rules to permit local public safety to build-out immediately, and thus prior to completion of a reauction of the D Block and selection of the air interface that would support nationwide interoperability. Alcatel-Lucent argues that, regardless of the technology deployed, the local network could be readily integrated into the regional or nationwide D Block license, and proposes that the D Block licensee would be required to "compensate the local public safety entity based upon commercially reasonable standards."⁵⁴⁷

302. While early deployment of public safety broadband networks would afford public safety agencies with the benefits of such networks more quickly, the Alcatel-Lucent proposal also poses a number of concerns. For example, unlike our current rules, which only contemplate the early build-out of systems utilizing the same technology as the D Block licensee, a public safety entity that engages in early deployment risks choosing a technology that is not compatible with the technology that will be deployed later by the D Block licensee. Although Alcatel-Lucent argues that any technology deployed by a public safety entity could be integrated into the regional or nationwide broadband network, we have tentatively concluded that the nationwide interoperable network should have the same air interface technology. Accordingly, we seek comment on how we can ensure that a public safety entity engaging in such early build-out selects a compatible technology that is fully interoperable with the Shared Wireless Broadband Network(s), meaning consistent with our tentative conclusions elsewhere concerning interoperability requirements for all operations in the 700 MHz public safety broadband spectrum, and thus not via gateways and bridges.

303. We also seek comment on Alcatel-Lucent's proposal that a D Block licensee seeking to operate in the area be required to compensate early public safety builders based upon "commercially reasonable standards." Should we replace our current rule, which limits compensation for early build to the costs that the D Block licensee would have incurred, with one based on "commercially reasonable standards?" How would "commercially reasonable terms" be determined? What if the network constructed by the local public safety agency was of little worth to the D Block licensee, whether due to technology choices, network design, or a D Block licensee's existing resources in the area? Would reliance on such a basis for compensation lead to significant or intractable disputes either at the Commission or in courts?

304. Given the potential costs and benefits in allowing early deployment of wireless public safety broadband networks, we seek comment on the appropriate balance between ensuring flexibility for public safety entities to engage in early deployment and providing some mechanism for compensation, if not under our existing rules, while also ensuring our goal of achieving nationwide interoperability across networks and maintaining the financial viability of the 700 MHz Public/Private Partnership. To what extent should public safety entities be allowed to deploy in advance of future build out by the D Block licensee? Are our existing rules on compensation for early build-out sufficient, or should some allowance be made for compensation for early build-out of systems using technologies that are different and

⁵⁴⁶ See *Second Report and Order* at ¶ 478.

⁵⁴⁷ Alcatel-Lucent Ex Parte at App. p. 2.